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No._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

FORT WORTH AND DENVER RAILWAY COMPANY, *Petitioner*

vs.

H. O. PRINE, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, and the order of said Court denying its petition for rehearing.

OPINIONS BELOW

The District Court entered judgment for the plaintiff on the verdict of the jury without written opinion (R. 35). The opinion of the United States Court of Appeals (R. 230) is reported in 211 F. 2d 697. The petition for rehearing was denied without opinion (R. 244).

JURISDICTION

The judgment of the Court of Appeals was entered on March 26, 1954 (R. 236). A petition for rehearing filed on April 10, 1954 (R. 238), was denied on May 6, 1954 (R. 244). The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (1).

QUESTIONS PRESENTED

1. Whether a jury finding that something happened which could not have happened will support a judgment.

2. Whether a jury finding that an employer was negligent in failing to warn an employee not to be negligent will support a judgment.

STATUTE INVOLVED

The case is brought under the Federal Employers' Liability Act, 45 U.S.C. Sections 51-60, as amended. We have omitted the printing of the statutory provisions because of the Court's undoubted familiarity with the Act, derived from the numerous cases of this nature reviewed upon certiorari within the past decade.

STATEMENT

The respondent-plaintiff brought this action to recover damages for personal injuries allegedly sustained while employed as a section hand by petitioner-respondent near Memphis, Texas, on August 13, 1951. A section of track between Memphis and Estelline had been replaced with new rails, and the old rails had been

strung along the right of way by the laying crew to be salvaged (R. 142). Ross Williams, petitioner's road-master, was in charge of the salvage operation (R. 143-144), and respondent was a member of the section crew (R. 51-52).

The rails were being picked up by means of a crane or boom mounted on a flat car and operated by air from the train line, termed an air rail loader (R. 145).[1] Work had commenced at about 8:30 A.M. (R. 144). Ross Williams was operating the boom, and respondent was assigned to one of the boom ropes.[2]

According to respondent, at some time between ten and eleven o'clock on that morning, he wound or tied the rope around his body "so that he could pull more" (R. 53, 56). Roach, a fellow employee, told him that it was dangerous to use the rope in this manner, and

---

[1]The mechanism consists of an air cylinder, a plunger, a cable, three pulleys, a guy post and the boom (see diagram, R. 169). The plunger is fitted into the air cylinder, and the cable is attached to the outer end of the plunger (R. 148-149). It runs through a pulley to the tip of the boom and thence to the ground (R. 148.) The boom is attached to a 12 foot guy post at a point some 5 feet above the bed of the flat car. It extends outward and upward at an angle of about 30 degrees, and its tip is 16 feet above the ground (R. 169). Its vertical hoisting capacity is 10 feet, accomplished entirely by the air cylinder, plunger and cable (R. 169). Power is supplied by air from the train line (R. 180). As the loader is put into operation, the air brakes are cut out, and the air from the locomotive which would normally operate the brakes on the car is turned into the air cylinder (R. 180-181). It comes into the cylinder very slowly, at 70 pounds pressure through a 1¼ inch orifice, and as the cylinder begins to fill, the plunger is forced gradually back into the chamber. The cable is drawn slowly backward by the plunger until the full weight of the load is felt (R. 148-149). There is a slight pause while more air pressure is built up in the air cylinder, and the rail is then pulled gradually upward by the cable (R. 149).

[2]The boom itself is stationary, but can be moved manually from side to side by means of ropes attached to its tip (R. 53, 146-147). When the rail has been lifted to the level of the car into which it is to be loaded, the boom is drawn laterally by men pulling on the boom ropes from the opposite side of the car until the rail is in position (R. 147). Sufficient air is then released to lay the rail upon the bed of the car, the rail hooks are disengaged, and the rail loader is moved by the work engine to the next rail to be picked up (R. 57).

he began to untie the knot (R. 57). While he was thus engaged, the whistle blew on the work engine indicating to respondent that the work train was to be moved on to another rail (R. 57). He glanced from the rail loader to the engine and in that instant was pulled or jerked to the ground some five to seven feet, injuring his back (R. 57-58). The boom rope fell from his waist as he got up, having untied itself in the process (R. 116). He doesn't know what pulled him to the ground, but as he got up, he saw that a rail was being loaded from the opposite side of the car (R. 59).

Respondent sought recovery for his alleged injuries, and trial was to a jury on November 6, 1952, resulting in a verdict for respondent. In answer to special issues, the jury found that Ross Williams negligently operated the rail loader so that respondent was pulled to the ground by the boom rope; that petitioner was negligent in failing to warn respondent that he should not tie the rope around him; that respondent was negligent in winding the rope around his body; that all three acts concurred to bring about his injuries; and that respondent's own negligence contributed to his injuries to the extent of 29.5% (R. 12, 20). Judgment was for $37,276.88 (R. 35).

The District Court overruled petitioner's motions for a directed verdict, for judgment non obstante veredicto, to set aside the verdict, and for a new trial, respectively, and the Court below affirmed this action (R. 119, 207, 34, 42, 236).

SPECIFICATION OF ERRORS

The Court of Appeals erred:

1. In holding that there was sufficient evidence to go to the jury as to whether petitioner's roadmaster, Ross Williams, operated the rail loader in such a negligent manner as to cause respondent to be jerked to the ground by the boom rope.

2. In holding that the evidence was sufficient to support the jury findings that petitioner should have warned respondent earlier than he was warned by his fellow employee that he should not keep the rope he was using wound around his body in doing his work, and that its failure to do so was a proximate cause of his injuries.

3. In affirming the judgment of the District Court.

4. In denying the petition for rehearing.

REASONS FOR GRANTING THE WRIT

Despite the consistent holdings of this Court that negligence must be established before a carrier may be held liable under the Act,[3] some writers and a few of the lower courts have by misinterpretation reached the conclusion that it is a compensation statute which imposes liability without fault.[4]

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[3]For example, *Brady v. Southern R. Co.* (1943), 320 U. S. 476, 88 L. Ed. 239, 64 S Ct. 232; *Ellis v. Union Pacific* R. Co. (1947), 329 U. S. 649, 91 L. Ed. 572, 67 S. Ct. 598; *Myers v. Reading Co.* (1947), 331 U. S. 477, 91 L. Ed. 1615, 67 S. Ct. 1334.

[4]See, for example, Raymond J. Moore, *Recent Trends in Judicial Interpretation in Railroad Cases Under the Federal Employers' Liability Act*, 29 Marquette Law Review 73, 93 (Feb. 1946); *Griswold v. Gardner* (CCA 7th, 1946), 155 F. 2d 333; *Missouri-Kansas-Texas R. Co. v. Evans*, (Tex. Civ. App. 1951), 243 S.W. 2d 181, reversed 250 S.W. 2d 385.

Petitioner has fallen a victim to the apparent confusion and uncertainty which such misinterpretations have bred, for the Court below appears to have subscribed also to this erroneous philosophy. It has upheld in this case a jury verdict in support of which there is a complete absence of evidence. It has accepted the finding of the jury that Ross Williams operated the boom negligently, causing respondent to be pulled to the ground by the boom rope, although the evidence is clear that it was mechanically and mathematically impossible for respondent to have been injured in that manner. It left undisturbed the finding of the jury that petitioner was negligent in failing to warn respondent that he should not tie the rope around his waist, despite the finding that respondent was himself negligent in doing that very thing. The holding of the Court is thus that a judgment under FELA may rest upon a jury verdict that something happened which could not happen, and that an employer has the absolute duty to warn its employees that they are not to be negligent. The erroneous philosophy of liability without fault seems to be fully accepted.

It was mechanically impossible for Ross Williams to bring about a *controlled* movement of the boom, because it is uncontroverted that:

(a) The boom is stationary;

(b) It can only be moved laterally by the boom ropes, pulled by men on the ground;

(c) The operator cannot move the boom,—he can only move the cable which runs through it (R. 53, 81, 146-147, 170-171).

It is obvious that if respondent was pulled to the ground by the boom rope around his waist, such a movement could only have been brought about *by the men on the ground handling the boom rope on the opposite side of the car,* because he testified that a rail was loaded from the other side of the car after he got to his feet (R. 59).

The boom could swing only 2½ feet to either east or west because of safety chains which restricted its lateral movement (R. 151). Respondent was standing on the east side of the work train at a point 45 feet north of the tip of the boom, and 24.5 feet east of the farthest point it could swing to the west (R. 72-73). The diagonal distance from respondent's position to this westernmost point, applying the Pythagorean theorem, is 51.23 feet ($\sqrt{45^2 + 24.5^2}$). The diagonal distance from respondent to the tip of the boom when in a position over the west edge of the car is 50.09 feet ($\sqrt{45^2 + 22^2}$).

If it was possible for the operator to "jerk" the boom, as respondent contends, and it was "jerked" suddenly the full distance of 2½ feet from the side of the car to its western limitation of motion, the "jerk" would have been only 1.14 inches (51.23 ft. minus 50.09) or a trifle less than 14 inches when transmitted to respondent via the boom rope. He had from 12 to 18 inches of slack in the rope (R. 84), and the "jerk" could not have pulled him down. It would not even have taken up the slack in the rope, the reason, of course, being that he was standing well within the orbit of the semicircle described by the boom. Thus, it was *mathematically impossible* for him to have been pulled to the ground by

any movement of the boom within the realm of the rankest possibility.

It is virtually Hornbook law that a master has no duty to warn his servant of dangers incident to his employment when such dangers are open and obvious, and that an obvious danger is one that is discoverable in the exercise of reasonable care by persons of ordinary prudence. This elementary principle means, of course, that a master is not required to warn his servant that he should not be negligent, and is directly contravened by the holding of the Court of Appeals.

The jury found that respondent was negligent in winding the rope around his body (R. 13-14, 17, 20). It also found that petitioner was negligent in failing to warn him that he should not do so (R. 16, 20). The holding of the Court of Appeals, which refused to upset the latter finding, is tantamount to a holding that petitioner was negligent for not warning respondent that he was not to be negligent.

The question presented here is of utmost importance in the administration of the Federal Employers' Liability Act. The decision of the Court below is believed to be erroneous, and if allowed to stand, will further complicate an already confused bench and bar as to whether or not a railroad is an insurer of its employees. Settlement of the question is plainly in the public interest. If, as this Court has consistently held, liability under the Act is grounded upon negligence, this case must be reversed.

An equally persuasive reason for granting this petition is that the decision of the Court below is in direct conflict with the decision of this Court in *Pennsylvania Railroad Company v. Chamberlain* (1933), 288 U.S. 333, 339, 53 S. Ct. 391, 77 L. Ed. 819, where it was said:

> "We, therefore, have a case belonging to that class of cases where proven facts give equal support to each of two inconsistent inferences; in which event, neither of them being established, judgment, as a matter of law, must go against the party upon whom rests the necessity of sustaining one of these inferences as against the other, before he is entitled to recover. (citing numerous cases)
>
> "The rule is succinctly stated in Smith v. First Nat. Bank, 99 Mass. 605, 611, 612, 97 Am. Dec. 59, quoted in the Des Moines Nat. Bank Case (C.C.A. 8th) 145 Fed. 273, supra:
>
> 'There being several inferences deducible from the facts which appear, and equally consistent with all those facts, the plaintiff has not maintained the proposition upon which alone he would be entitled to recover . . . When the evidence tends equally to sustain either of two inconsistent propositions, neither of them can be said to have been established by legitimate proof. A verdict in favor of the party bound to maintain one of those propositions against the other is necessarily wrong.'"

The Court below has also decided this case in direct conflict with its own decision in *Carolina Life Insurance Co. v. Williams*, 210 F. 2d 477. There, Williams had been insured by the defendant against accidental death. He was found dead of a ruptured aorta in a

pasture three hours after he had entered it, carrying several ears of corn, to catch a horse for some children to ride. The horse was known to be gun-shy, and there was evidence that a shot had been fired shortly after he entered the pasture. There were no witnesses. When found, the corn was partially eaten. The medical testimony was that it might be inferred that Williams met his death either by voluntary exertion or strain, or by being accidentally thrown from the horse. The jury found that death resulted from the latter cause. The Court below reversed, holding that the evidence supported equally each of the two inferences and thus neither was established. The *Chamberlain* case was cited and leaned upon heavily. Petition for rehearing was denied on March 20, 1954, just six days before the conflicting decision in this case.

The only fact established by the evidence in this case, when viewed in a light most favorable to respondent, is that in some way he was pulled to the ground. The questions of how he got there and what caused it must be answered by inferences drawn from the fact that the boom rope was around his waist, the other end being tied to the boom, and from his testimony that a rail was being loaded from the other side of the car as he got up.

These facts give rise to two inconsistent inferences. The first and most plausible is that the boom was moved by the men handling the boom ropes, since the evidence is uncontroverted that they provided the only means by which the boom could be moved from side to side. The second and most improbable because it is mechan-

ically impossible, is that Ross Williams operated the boom in a negligent manner, causing respondent to be pulled down by the boom rope.

But negligence on the part of the men handling the boom ropes was neither pleaded nor proved by respondent as a ground for recovery. He had the burden of sustaining by a preponderance of the evidence the inference that Williams jerked the boom against the other more plausible inference before he could recover. This he failed to do. The decision of the Court below in permitting the jury to accept one inference as against the other is erroneous, and directly conflicts with the *Chamberlain* and *Williams* decisions, which are believed to be correct. The conflict should be resolved by reversing this case.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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June ....., 1954.

25/4

FILED
JUL 24 1954
HAROLD B. WILLEY, Clerk

No. 165

In the

Supreme Court of the United States

OCTOBER TERM, 1954

FORT WORTH & DENVER RAILWAY COMPANY,
Petitioner,

v.

H. O. PRINE,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITIONER'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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No. 165

In the

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OCTOBER TERM, 1954

FORT WORTH & DENVER RAILWAY COMPANY,
Petitioner,

v.

H. O. PRINE,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITIONER'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINION BELOW

The District Court for the Northern District of Texas, Amarillo, entered judgment without written opinion. The opinion of the Court of Appeals, Fifth Circuit is reported in *211 F. 2d 697*, and the petition for rehearing was denied without opinion (R. 244).

JURISDICTION

The petition sets out sufficiently the jurisdictional requisites.

QUESTIONS PRESENTED

The questions actually presented are not as set out in petitioner's brief and petition for the reasons hereinafter shown.

The questions actually presented are:

1. Is the evidence sufficient to support the jury's finding as to whether or not the boom in question jerked.

2. Was there sufficient evidence to support the jury finding that Employer Railroad, which was defendant in the trial court, was negligent in failing to warn inexperienced employee, plaintiff in trial court, of the danger in connection with operation of the boom in question.

The defendant (petitioner) contended that the event could not have happened, but this was also a question of fact which was found against the defendant (petitioner) by the jury's answer to Special Issue No. 6 (R. 15).

The second question is not whether the defendant (petitioner) was negligent in failing to warn the plaintiff employee (respondent) not to be negligent but *the failure of defendant employer to warn plaintiff employee of the danger.*

STATUTE INVOLVED

The case is brought under the Federal Employers Liability Act, *45 U. S. C., Sections 51 to 60,* as amended. We,

like petitioner, feel that no useful purpose would be served in printing the entire statute herein because of the many times this act has been considered by this Honorable Court in the past few years.

STATEMENT

We adopt the statement of this case as outlined by the Honorable Court of Appeals (5 Cir.) in its opinion, *Fort Worth & Denver Railway Co. v. H. O. Prine, 211 F. 2d 697*, the statement being set out on pages 698 to 700 of said opinion. This statement of the case is clear and concise and fully supported by the testimony shown in the record.

The Decision Below is Clearly Correct

The questions raised in the Court of Appeals (5 Cir.) as well as in this Court and the *entire* argument of the petitioner present questions of evidence relevant and appropriate only for consideration by the jury in the trial court.

We respectfully submit that this Honorable Court fully decided all questions in this case in *Wilkerson v. McCarty, 69 S. Ct. 413, 336 U. S. 53, Rehearing denied, 69 S. Ct. 744, 336 U. S. 940.*

Certainly the railroad is not the insurer of the safety of its employees, but the question of its negligence and the contributory negligence of the employee are issues of fact to be determined by the trial jury alone.

Respondent's position is further supported by *Lavender v. Kurn, 66 S. Ct. 740, 327 U. S. 645, 90 L. Ed. 961; Tiller*

v. Atlantic Coast Line Ry. Co., 63 S. Ct. 444, 318 U. S. 54, 87 L. Ed. 610.

The mathematical formula submitted on page 7 of the petition only raises a question for jury argument, which was fully argued to the jury, the trial court and the Court of Appeals without any degree of success because there were so many elements which destroyed any force of petitioner's argument. The force of the jerk was of extreme importance which petitioner does not even attempt to argue or explain. Most important is the fact that the estimates of slack in the rope, the length of slack in the safety chains, and whether or not they were fastened at any given length were only estimates and not exact measurements. The weight of the boom, the weight of the rail and the force of the air, along with the fact that much of the material testimony was only estimates, destroys the force, if any, of petitioner's proposition.

This very question was presented in: *Coker v. Central Vermont Railway Company (2 Cir.), 172 F. 2d 324;* and *Fitzgerald v. Pennsylvania Ry. Co. (2 Cir.), 164 F. 2d 323.* In each of these cases the defendant railroad claimed that it was mathematically or physically impossible for the employee to have been injured as contended by the plaintiff. In each case the Court held that the questions raised were questions of fact to be decided solely by the jury.

We respectfully submit that the evidence in each of the above cases was much more favorable to the defendant railroad than in this case. In fact in this case, the defendant petitioner failed to introduce one word of testimony

that directly disputed the contention of plaintiff (Respondent).

The pictures of the rail loader in question (R. 49, 50) show that any testimony as to rope and chain slack would be only estimates. The pictures and a model of the rail loader were before the jury, the trial court and the Court of Appeals, and were fully studied in each instance.

The roadmaster could have caused the boom to jerk just as effectively by a sudden tightening of the rope when attached to a heavy rail as if the air worked the boom directly. This was not questioned by the defendant (petitioner).

The roadmaster testified that the rail loader was very old and could not be depended on one hundred per cent (R. 154).

As to warning the injured plaintiff employee (respondent) the roadmaster admitted that he had testified on a former trial that *an unexperienced employee would not know the danger* and that he, the roadmaster who was an experienced man (some 28 years of experience) knew of the danger (R. 155, 156).

Plaintiff's (respondent) contention is materially supported by the testimony of the disinterested witness J. W. Roach *and is not denied by any witness.* Roach saw plaintiff on the ground (R. 75). The witness, a long time employee of defendant (petitioner) (R. 75) knew from experience that the very same rail loader had jerked in the past (R. 77).

This evidence along with the other facts and circumstances supported plaintiff's (respondent) testimony that he was jerked down by the boom (R. 58).

As to the issue of negligence on lack of warning, plaintiff (respondent) testified that he had never seen this type of rail loader before (R. 53) and this was not disputed. Ross Williams, the roadmaster, testified that he gave *no instructions* and knew it was dangerous for a person to have the rope around him (R. 155, and R. 158).

This testimony, along with other undisputed facts, certainly raised a question for the jury as to failure to warn and the answers of the jury were amply supported by the evidence.

We respectfully submit that the decision below was clearly correct especially in view of the fact that this case stands without one single objection being raised as to the pleadings, the form of the charge, the admissibility of evidence or anything else material.

There Is no Conflict of Decisions

We are unable to understand how petitioner can make the contention that the decision in this case is in conflict with the authorities cited in the petition or any other decision reporter.

If respondent, H. O. Prine, had been killed and there had been no live witnesses, then the cases cited in the petition would have been in point but under the state of the record they do not come close to being in point.

The decision in *Carolina Life Insurance Co. v. Williams, 210 F. 2d 477*, upon which petitioner relies, is certainly not in conflict with the decision in this case. In fact it is by the same Court of Appeals and same judge. (5 Cir.)

In the above case there was no witness nor was there a circumstance to support plaintiff's theory of accidental death. Actually all of the evidence introduced by plaintiff disputed plaintiff's contention that the death of the deceased was accidental. Plaintiff's witness Price defeated plaintiff's theory that deceased was killed while mounting or attempting to mount a horse because he testified that when he last saw deceased he (deceased) was walking toward the highway and that the horse was not in sight.

We respectfully submit that there is not a line of evidence to support plaintiff's theory in the above case and in the case at bar, there is ample direct testimony as to how plaintiff (respondent) was injured and many circumstances to support the direct evidence, while defendant railroad (petitioner) only offers a theory based on guess work and estimates which was rejected by the jury, the trial court and the Court of Appeals.

We also submit that this case is not in conflict with the decision of this Honorable Court in *Pennsylvania Railroad Company v. Chambers, 288 U. S. 333, 339, 53 S. Ct. 391, 77 L. Ed. 819.* The plaintiff (respondent) in this case offered one theory which was supported by ample evidence, the defendant (petitioner) offered a theory of defense.

The plaintiff (respondent) contended and made a clear case proving that defendant (petitioner) was negligent in the following respects: (1) Defendant was negligent in jerking the boom without warning employee; (2) Defendant was negligent in failing to warn employee (R. 5). Plaintiff's (respondent) theory of liability and defendant's (petitioner) defensive issues were submitted to the jury in the Court's Charge and the verdict entitled plaintiff to the judgment rendered by the Court (R. 12 to 21).

The only cases we have found support the decision of the Court below in this case. The two authorities most in point being: *Coker v. Central Vermont Ry. Co. (2 Cir.), 172 F. 2d 324* and *Fitzgerald v. Pennsylvania Ry. Co. (2 Cir.), 164 F. 2d 323.* These cases hold under very similar contentions that the questions of negligence on the part of defendant and contributory negligence were questions of fact for a jury.

We respectfully submit that the decision of the Court below is not in conflict with the authorities submitted by petitioner nor any other authority.

There Is no Important Question of Federal Law

We respectfully submit that there is no important question of Federal law. If the plaintiff (respondent) had failed to prove negligence on the part of defendant (petitioner) or if the defendant (petitioner) had been denied a trial by jury, then a question of Federal law would be presented.

The remarks of the trial court in overruling defendant's (petitioner) motion for an instructed verdict (R. 203,

206), clearly point out the elements which properly make the questions raised, issues to be submitted to the jury and being ample and sufficient to support the verdict of the jury.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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July 19, 1954.